International Bank Malaysia Bhd (formerly known as Hock Hua Bank (Sabah) Bhd) v Lovintih bte Balantai @ Betty

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S–02–527 OF 2000
MOKHTAR SIDIN, MOHD GHAZALI JJCA AND ABDUL WAHAB PATAIL J
17 SEPTEMBER 2007

Native Law and Custom — Land dispute — Customary rights over land — Dealings in native land — Agreement to jointly develop land — Appointment of second defendant as nominee to facilitate development process — Whether land could be transferred to and owned by a non-native

Native Law and Custom — Land dispute — Sale of land — Bona fide third party — Whether fourth defendant bank was bona fide third party in respect of the execution of a charge over the land — Whether third party discharged duty to make inquiries — Whether third party under obligation to determine regularity of transaction

Balantai bin Sinangau, the plaintiff in the court below, was the registered owner of a piece of land. In the course of trial, Lovinith Balantai was substituted as plaintiff by order of court because Balantai Sinangau passed away ('the deceased'). Sometime in February 1984, Yeo Kee Seng ('YKS'), the first defendant in the court below, approached the deceased and introduced to him a plan to develop the said land into a housing estate. YKS was alleged to have represented to the deceased that being a non-native, he could not purchase the land as it was held under Native title. As such, he proposed that Naman bin Dalu ('Naman'), the second defendant in the court below, be appointed his attorney to facilitate the development process of the said land. The deceased and Naman thereafter entered into an agreement to develop the said land. Nothing happened for about eight years until the deceased applied for the lodgement of a collector's caveat over the said land on the ground that there was a reasonable belief that YKS or Naman were involved in an improper dealing in relation to the said land. The deceased then executed a Deed of Revocation of Power of Attorney and registered the same in district land office. However, about nine months later, Naman purportedly as attorney for the deceased executed a Memorandum of Transfer in respect of the said land to YKS in consideration for the sum of RM50,000. The Assistant Collector of Land Revenue, Penampang ('ACLR') accepted the said transfer for registration. Seven months later YKS executed a Memorandum of Charge in favour of the appellant bank — the fourth defendant in the court below — as security for a loan of RM100,000. The ACLR accepted the said charge for registration. The deceased filed this action against YKS, Naman, and the ACLR claiming that he had been the subject of illegal and/or fraudulent acts of YKS, Naman and the ACLR. The deceased sought inter alia a declaration that the

Memorandum of Transfer and the Memorandum of Charge are null and void and of no legal effect, an order that the title deed of the said land be returned to the deceased and damages to be assessed for the fraudulent acts. The High Court allowed the reliefs prayed for in the suit. Only the fourth defendant appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) What is clear, pursuant to s 64 of the Ordinance, is that no non-native may purchase any land held under a Native Title, unless in accordance with the terms of s 17 of the Ordinance, or acquire any interest therein by way of charge or otherwise. In the instant appeal the evidence showed that the Native Title to the said land was issued to the deceased as owner and was signed by the Collector in accordance with s 67(3) of the Ordinance. Thus, pursuant to the Ordinance, only a 'Native' can own land held under a Native Title and only he can charge such land to the persons or institutions mentioned in s 17(4) of the Ordinance. YKS had not furnished any evidence to show that he is a 'Native' and hence did not qualify to own land held under Native Title (see paras 96 & 99–100).

(2) The ACLR, Penampang was and is at all times duty bound to see that dealings in land do not fall foul of the provisions of the Ordinance. He would be aware of the statutory provisions which need to be adhered to in the course of his duties and daily work. He cannot act contrary to statutory requirements which would have the effect of nullifying the provisions of the Ordinance. He also cannot ignore statutory requirements or restrictions and act as if they are non-existent. He even seemed to have ignored the fact that the deceased vide his solicitors has lodged a caveat prior to the transfer of the said land (see paras 105 & 107).

(3) According to the appellant, the legal documents and all legal matters involved in the preparation of the Memorandum of Charge were attended to by their solicitors. The appellant claimed that the appellant was not aware of any dispute nor complaint over the said land and that the title to the said land does not indicate nor show any other interest registered therein. It is difficult to fathom the reasons canvassed by the appellant to support their contention that they are bona fide under the circumstances. First of all, what would be clear to the appellant at the time of their entry into the transaction is that the land to be charged is held under Native Title. The next issue which would concern them would be restrictions in relation to dealings over land held under Native Title. They had solicitors on record to advise them who would be knowledgeable about such restrictions in relation to land held under Native Title. The fact that YKS is the registered owner at the time of their entry into the transaction would have alerted them. Surely that would have put them on guard that something is not quite right, viz, that YKS may not be a 'Native' and hence his position as registered owner is suspected. Seeking further legal advice from their solicitors would consequently alert them to request from YKS

additional proof of ownership, eg a copy of an appropriate declaration, if any, made by a Native Court pursuant to s 2(3) of the Interpretation Ordinance (see paras 111 & 113).

(4) In addition, a search at the land office conducted at the material time when they entered into the transaction would have revealed further that there are various 'past and present caveats'. After all, a caveat does constitute notice to the world at large of its contents (see para 113).

(5) The appellant is a local bank in the State of Sabah. They must have knowledge of the restrictions in dealings over land held under Native Title pursuant to the land laws of Sabah. They cannot come to court and claim that the title to the said land is a clean title and maintain that they are a bona fide party for value without notice upon registration of a land dealing and indirectly ignoring the law relating to Native Lands in Sabah. The appellant is in the business of lending money to their customers and surely they would want a safe and proper collateral which will adequately protect the moneys loaned in the eventuality of a default (see para 114).

(6) The appellant had full knowledge that the title to be charged was held under Native Title and that would put them on guard or put them on inquiry that YKS may not be 'Native' and hence cannot own such land. These circumstances would put a reasonable person on inquiry. The appellant, upon perusing the provisions of the Ordinance and the Interpretation Ordinance and after conducting a thorough search with the land office would be in a position to ascertain whether there was a possibility of irregularities with regards to ownership of the said land by YKS who may not be a 'Native'. They cannot proceed with the transaction unless they have ascertained the legality of the ownership of the said land under these circumstances (see para 115).

[Bahasa Malaysia summary

Balantai bin Sinangau, plaintif di mahkamah bawahan, merupakan pemilik berdaftar sebidang tanah. Semasa perbicaraan, Lovinith Balantai digantikan sebagai plaintif melalui perintah mahkamah kerana Balantai Sinangau meninggal dunia ('si mati'). Sekita Februari 1984, Yeo Kee Seng ('YKS'), defendan eprtama di mahkamah bawah, bertemu dengan si mati dan memperkenalkan kepadanya satu pelan untuk memajukan tanah tersebut untuk dijadikan kawasan perumahan. YKS dikatakan telah mengemukakan kepada si mati bahawa sebagai seorang yang bukan anak watan, beliau tidak boleh membeli tanah tersebut kerana ia dipegang di bawah hak milik anak watan. Oleh itu, beliau mencadangkan agar Naman bin Dalu ('Naman'), defendan kedua di mahkamah bawah, dilantik sebagai peguamnya untuk memudahkan proses pembangunan tanah tersebut. Tiada apa berlaku untuk lapan tahun sehingga si mati memohon satu kaveat pemungut dimasukkan ke atas tanah tersebut atas alasan terdapat kepercayaan yang munasabah bahawa YKS atau Naman terlibat dalam urusan yang salah berkaitan tanah tersebut. Si mati kemudian telah menyempurnakan satu surat ikatan pembatalan surat kuasa wakil dan mendaftarkannya di pejabat tanah daerah. Namun, lebih kurang sembilan bulan kemudian, Naman yang dikatakan peguam bagi pihak si mati telah

menyempurnakan satu Memorandum Pindah Milik berkaitan tanah tersebut kepada YKS dengan balasan untuk jumlah RM50,000. Penolong Pemungut Hasil Tanah, Penampang ('PPHT') menerima pindah milik tersebut untuk pendaftaran. Tujuh bulan kemudian YKS menyempurnakan satu memorandum gadaian bagi pihak bank perayu — defendan keempat di mahkamah bawah — sebagai cagaran untuk pinjaman RM100,000. PPHT menerima gadaian tersebut untuk pendaftaran. Si mati telah memfailkan tindakan ini terhadap YKS, Naman dan PPHT dengan mendakwa bahawa beliau menjadi mangsa tindakan-tindakan yang menyalahi undang-undang dan/atau penipuan YKS, Naman dan PPHT. Si mati memohon antara lain satu deklarasi bahawa memorandum pindah milik dan memorandum gadaian adalah terbatal dan tidak sah dan tidak berkuat kuasa, satu perintah bahawa surat ikatan tanah tersebut dikembalikan kepada si mati dan ganti rugi ditaksirkan untuk tindakan-tindakan berunsur penipuan itu. Mahkamah Tinggi membenarkan relif-relif yang dipohon dalam guaman tersebut. Hanya defendan keempat telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Apa yang jelas, menurut s 64 Ordinan, adalah bahawa tiada yang bukan anak watan boleh membeli apa-apa tanah yang dipegang di bawah hak milik anak watan, kecuali menurut terma s 17 Ordinan, atau memperoleh apa-apa kepentingan ke atasnya melalui gadaian atau sebaliknya. Dalam rayuan semasa keterangan menunjukkan bahawa hak milik anak watan ke atas tanah tersebut dikeluarkan kepada si mati sebagai pemilik dan ditandatangani oleh Pemungut menurut s 67(3) Ordinan. Oleh itu, menurut Ordinan, hanya 'anak watan' boleh memiliki tanah yang dipegang di bawah hak milik anak watan dan beliau hanya boleh mencagarkan tanah tersebut kepada individu atau institusi yang dinyatakan dalam s 17(4) Ordinan. YKS tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa beliau seorang 'anak watan' dan oleh demikian tidak layak memiliki tanah yang dipegang di bawah hak milik anak watan (lihat perenggan 96 & 99–100).

(2) PPHT, Penampang adalah dan masih pada setiap masa matan terikat untuk memastikan urusan tanah tidak melanggar peruntukan Ordinan. Beliau pasti mengetahui peruntukan statutori yang perlu dipatuhi dalam melaksanakan tanggungjawab dan tugas harian beliau. Beliau tidak boleh bertindak bertentangan dengan keperluan statutori yang akan memberi kesan membatalkan Ordinan tersebut. Beliau juga tidak boleh menghiraukan keperluan atau sekatan statutori dan bertindak seperti ia tidak wujud. Beliau juga seperti tidak menghiraukan fakta bahawa si mati melalui peguamnya telah memasukkan kaveat untuk pindah milik tanah tersebut (lihat perenggan 105 & 107).

(3) Menurut perayu, dokumen sah dan semua urusan yang terlibat dalam penyediaan memorandum gadaian telah dikendalikan oleh peguam mereka. Perayu mendakwa bahawa perayu tidak sedar tentang apa-apa pertikaian atau aduan ke atas tanah tersebut dan bahawa hak milik tanah tersebut tidak menandakan atau menunjukkan kepentingan berdaftar yang lain. Adalah sukar untuk menduga sebab-sebab yang diberikan oleh perayu untuk menyokong

hujah mereka bahawa mereka adalah bona fide dalam keadaan sedemikian. Pertamanya, apa yang jelas kepada perayu pada masa kemasukan mereka dalam transaksi adalah bahawa tanah yang dicagarkan dipegang di bawah hak milik anak watan. Isu seterusnya yang perlu diambilkira adalah sekatan berkaitan urusan ke atas tanah yang dipegang di bawah hak milik anak watan. Mereka adalah peguam atas rekod untuk menasihati mereka berhubung siapa yang berpengetahuan tentang sekatan berkaitan tanah yang dipegang di bawah hak milik anak watan itu. Fakta bahawa YKS adalah pemilik berdaftar pada masa kemasukan mereka dalam transaksi sepatutnya menyedarkan mereka. Pasti itu telah membuat mereka menyedari bahawa sesuatu tidak betul, iaitu YKS mungkin bukan 'anak watan' dan oleh itu kedudukannya sebagai pemilik disyaki. Dengan merujuk kepada peguam mereka untuk nasihat undang-undang seterusnya akan menyedarkan mereka untuk meminta daripada YKS bukti pemilikan tambahan, contohnya sesalinan deklarasi yang sesuai, jika ada, dibuat oleh Mahkamah Anak Watan menurut s 2(3) Ordinan Tafsiran (lihat perenggan 111 & 113).

(4) Tambahan pula, carian di pejabat tanah yang dilakukan pada masa matan apabila mereka memasuki transaksi itu sudah tentu mendedahkan terdapatnya pelbagai 'past and present caveats'. Bahkan, suatu kaveat membentuk notis kepada umu tentang kandungannya (lihat perenggan 113).

(5) Perayu adalah bank tempatan di negeri Sabah. Pasti ia mengetahui tentang sekatan dalam urusan ke atas tanah yang dipegang di bawah hak milik anak watan menurut undang-undang tanah Sabah. Ia tidak boleh ke mahkamah dan mendakwa bahawa hak milik tanah tersebut adalah hak milik bersih dan mengekalkan bahawa ia merupakan pihak bona fide untuk nilai tanpa notis setelah pendaftaran urusan tanah dan secara tidak langsung tidak mengendahkan undang-undang berkaitan tanah anak watan di Sabah. Perayu berada dalam perniagaan memberikan pinjaman wang kepada pelanggan dan pastinya menginginkan kolateral yang selamat dan teratur yang akan melindungi wang yang dipinjamkan dengan sewajarnya sekiranya berlaku kegagalan (lihat perenggan 114).

(6) Perayu mempunyai pengetahuan bahawa hak milik yang akan dicagarkan dipegang di bawah hak milik anak watan dan itu menjadikan mereka berjaga-jaga atau bersedia menyoal YKS mungkin bukan 'anak watan' dan oleh itu tidak bolah memiliki tanah sebegini. Keadaan berikut akan menyebabkan seseorang yang munasabah menyiasat. Perayu, setelah meneliti peruntukan Ordinan dan Ordinan Tafsiran dan setelah melakukan carian dengan pejabat tanah berada dalam satu kedudukan untuk menentukan sama ada terdapat kemungkinan luar aturan berkaitan pemilikan tanah tersebut oleh YKS yang mungkin bukan seorang 'anak watan'. Mereka tidak boleh meneruskan transaksi itu kecuali mereka telah menentukan kesahan pemilikan tanah tersebut dalam keadaan berikut (lihat perenggan 115).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 652–659.

For cases on sale of land, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 674–675.

Cases referred to

Ong Ban Chai & Ors v Seah Siong Mong [1998] 3 MLJ 346
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465

Legislation referred to

Interpretation (Definition of Native) Ordinance (Cap.64)
Land Ordinance (Sabah Cap 68) ss 4, 17(4), 64(2), 67(1), (3), 70(2), 88, 91, 93, 104, Part IV
Rules of the High Court 1980 O 18 r.19

Appeal from: Suit No K22–45 of 1996 (High Court, Kota Kinabalu)

Teo Chee Kang (Shelley Yap Leong Hsu Chong Chia & Co) for the appellant.
Hamid Ismail (Sugumar & Co) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This dispute revolves around a piece of land held under Native Title No 213044378 situated at Kg Nosoob in the district of Penampang, Sabah measuring slightly over 5 acres ('the said land').

[2] Balantai bin Sinangau, deceased ('the deceased'), the plaintiff in the court below was the former registered owner of the said land. In the course of the trial his daughter, Lovintih bte Balantai @ Betty was substituted as plaintiff by order of the court on 20 July 2000 (the respondent in this appeal). The judgment of the court below in this suit was delivered on 26 July 2000.

[3] Yeo Kee Seng, the first defendant in the court below and who is not a party to this appeal, became the registered owner of the said land on 8 November 1993 ('YKS').

[4] Naman bin Dalu @ Jamesoon, the second defendant in the court below and who is also not a party to this appeal, was the former attorney of the deceased in respect of the said land and at the material time was an employee of YKS ('Naman').

[5] The Assistant Collector of Land Revenue, Penampang, who was the third defendant in the court below ('he ACLR, Penampang'), had at the outset of the proceedings made an application to be struck out as a party. The application was allowed by the court on 7 October 1999.

[6] The appellant (the fourth defendant in the court below), a locally incorporated bank was allowed to intervene and added as a defendant by court order on 4 September 1997.

THE BACKGROUND

[7] Sometime in early February 1984 YKS approached the deceased and introduced to him a plan to develop the said land into a housing estate. YKS represented to the deceased that being a non-native, he cannot purchase the said land, it being held under Native Title and neither can he be an attorney for the deceased. As such he proposed that his employee, Naman be appointed as attorney to facilitate the development process of the said land.

[8] It would appropriate to mention here that s 4 of the Land Ordinance (Sabah Cap 68) ('the Ordinance') provides that 'Native Title' means an entry in the Native Title Register or in the Field Register under Part IV. Section 67(1) which is found under Part IV of the Ordinance intituled 'Native Lands' provides a Register of Native Titles shall be kept in each district in the form of Schedule X. The said land was registered under the Register of Native Titles on 9 October 1968 with the deceased as the registered owner.

The agreement

[9] On 21 February 1984 the deceased and Naman entered into an agreement to develop the said land into a housing estate on the terms and conditions therein ('the agreement'). The deceased was described in the agreement as 'the Owner' and Naman as 'the Developer'. The following were amongst the terms and conditions of the agreement:

(a) Clause 1 — Naman shall develop the said land at his own costs and expenses into a housing estate;

(b) Clause 2 — upon execution of the agreement Naman shall be entitled to:

(i) take possession of and enter upon the said land;

(ii) prepare the said land for construction by cutting and levelling;

(iii) submit development plans for approval by the local authority and Government department concerned;

(c) Clause 3 — upon the development plans being approved Naman shall cause the said land 'to be survived and subdivided and thereafter to construct houses thereon';

(d) Clause 4 — on completion of all the houses Naman shall at his discretion transfer 10 units of single-storey terrace houses to the deceased or his nominees and the deceased shall further receive the sum of RM50,000 in cash upon approval of the subdivision and conversion plans by the relevant authorities;

(e) Clause 5 — Naman shall be entitled 'to sell all the other lots to any person and at whatever price and on whatever (sic) as he may deem appropriate';

(f) Clause 6 — upon execution of the agreement the deceased shall not further deal with the said land in any manner;

(g) Clause 7 — Naman hereby undertake to complete the construction of all the houses within 36 calendar months from the date the authorities grant approval for the conversion and subdivision of the said land and if Naman fail to complete the said houses within 36 months, he shall pay a penalty of RM500 per month until such completion;

(h) Clause 10 — the deceased shall give reasonable assistance to and co-operate with Naman in the development of the said land and in particular the deceased shall:

(i) when requested by Naman sign all development plans for submission to the local authority concerned;

(ii) if and when necessary sign all application in connection with the conversion and subdivision of the said land;

(iii) surrender the title to the said land for the purpose of subdivision;

(iv) accept and sign all subdivided titles when issued;

(v) as and when requested by Naman sign all necessary Memorandum of Transfers of the subdivided lots to the respective purchasers nominated by Naman;

(vi) allow Naman to charge the said land 'to any person, company or bank to accure (sic) loan for the development of the said land';

(i) Clause 11 — in order to facilitate the performance by Naman of the several conditions mentioned in cl 10, the deceased hereby agrees to execute a power of attorney concurrently with the execution of the agreement by appointing Naman his Attorney and 'confer in (sic) powers to do and execute' on behalf of the deceased the conditions mentioned in cl 10; the power of attorney shall be irrevocable:

(i) until Naman have fully developed the said land and transferred all the subdivided lots, with the exception of the lots retained by the deceased; or

(ii) Naman 'has committed a breach of any condition herein and on his part to be performed' but provided that the deceased shall just give Naman written notice of the breach he complains of and requiring Naman to stop or remedy the breach within three months from the date of the notice;

the power of attorney may also be revoked if the agreement is mutually cancelled;

(j) Clause 13 — the agreement shall be deemed to be mutually cancelled in the event if:

(i) the development plans are not approved by the local authority concerned; or

(ii) the State Government refuses the conversion of usage of the said land or the premium imposed is so high as to make the proposed development of the said land not viable; upon the mutual

cancellation of the agreement Naman shall not claim from the deceased any costs of development previously incurred by him and the deceased shall return all sum of money, if any, to Naman immediately.

(k) Clause 17 — notwithstanding anything to the contrary hereinbefore provided, Naman 'shall have the right to form a partnership with other persons or company for performing his part of this Agreement'.

THE POWER OF ATTORNEY

[10] Simultaneously on 21 February 1984, viz, the day the agreement was executed and pursuant to cl 11 of the agreement, the deceased signed a 'Power of Attorney' ('the power of attorney') wherein he appointed Naman to be his attorney 'to perform the following acts and things, pertaining to the said Land', namely:

(1) to take possession of the said Land to manage and superintend the management of the same;

(2) to clear, cut, fill up and level the said Land;

(3) to sign and submit development and building plans pertaining to the development of the said land to the Local Authority and Government Departments concerned for approval;

(4) to cause the said Land to be surveyed and subdivided in accordance with approved development plans;

(5) to apply to the Central Land Office and the Local Authority concerned for the conversion of usage and the term of alienation (ie to say from Native Title to Country Leases for building purposes) of the said Land and the subdivision thereof. For the purposes aforesaid to sign all applications;

(6) to liase and negotiate with the Pengarah Tanah dan Ukur and the Local Authority concerned in all matters concerning the conversion of usage and subdivision of the said Land and the payment of premium if any;

(7) to surrender the Title of the said Land to the Central Land Office for subdivision and for the purpose to sign Surrender of Title form on my behalf;

(8) to accept and sign draft subdivisional titles to replace the original title to the said Land. To cause the draft subdivisional titles to be registered and thereafter to obtain the same from the Central Land Office;

(9) to construct houses on the said Land in accordance with approved plans. To sell to any person and at whatever prices as my Attorney may deem fit all subdivisional lots comprised in the housing estate being developed on the said Land;

For the purposes aforesaid to enter execute contracts agreements deed with any purchaser and to collect deposits and all proceeds of sale from purchasers.

(10) to execute Memorandum of Transfer in respect of each subdivisional lot transferring the same to any purchaser;

(11) to raise any loan from any person company or Bank on the security of the said Land. For the purposes aforesaid to execute Memorandum of Charge over the said Land;

(12) to execute a valid Memorandum of Transfer in respect of the said piece of Land transferring the same to any person;

(13) to bring or defend any action or other proceedings in respect of or affecting the said Land and the development thereof;

(14) to pay all costs of development of the said Land, in particular to pay all professional fees and charges and premium if any;

(15) and generally, to do and perform all necessary acts, things, matters and deeds incidental to the exercise and performance of the several powers herein granted as fully and effectually in all respects as I could personally do and perform.

AND I hereby undertake to allow ratify and confirm everything which my said Attorney shall lawfully do or suffer to be done by virtue of these presents and I DECLARE that for consideration received this Power of Attorney is IRREVOCABLE until the said Land have been fully developed and all the subdivisional lots sold in accordance with the agreement executed between me and my Attorney.

[11] Subsequently, by letter dated 6 December 1984, the Chairman of Majlis Daerah Penampang ('the Majlis') informed the deceased that the proposed development plan to develop the said land submitted by the architect, Messrs Billings Leong & Tan is approved. That letter reads:

Balantai bin Sinangau

WDT No 250

Kota Kinabalu

RE: PROPOSED DEVELOPMENT ON

NT 4437 AT KG. NOSOOB. PENAMPANG

FOR BALANTAI BIN SINANGAW

SUBMITTED BY ARKITEK BILLINGS LEONG & TAN SDN BHD

I refer to your letter dated 5 November 1984 and am to inform you that your development plan is approved subject to its incorporation into the final Penampang Local Plan.

Your development plan will be endorsed accordingly in due course.

[12] Nothing happened for about eight years from the date of the above letter until 12 November 1992 when the deceased, through his then solicitors, Messrs Richard Malanjum Idang & Rantau wrote to the ACLR, Penampang and applied for lodgement of a collector's caveat against the said land on the ground that there was a reasonable belief that YKS and/or Naman were involved in an improper dealing pertaining to the said land.

[13] Subsequently by letter dated 14 November 1992, the deceased's solicitors wrote to Naman as follows:

Dear Sir

RE: DISCHARGE BY BREACH

AGREEMENT DATED THE 21ST DAY OF FEBRUARY 1984

We act BALANTAI BIN SINANGAU and have due instruction from our client to refer to the Agreement dated the 21st day of February 1984 entered into between your good self and our client.

We are instructed that the said Agreement was made to facilitate the development of our client's land comprised and described in NT 4437 situated in the District of Penampang into a housing estate on the terms and conditions as contained therein.

Pursuant to Clause 3 of the said Agreement, you as Developer shall be entitled to cause the said land to be survived (sic) and subdivided and thereafter to construct houses thereon upon the development plans for the said land being approved by the relevant authorities. Further by Clause 7 of the same, you undertake to complete the construction of all the houses within thirty-six (36) calendar months from the date the authorities grant approval for the conversion and subdivision of the said land.

The development plans for the said land was duly approved sometime in 1985. In breach of Clause 3 of the said Agreement, you have however failed neglected and/or refused to prepare the said land for construction nor is there any cause on your part to have the said land subdivided.

In view of the development plans having been approved some seven (7) years ago, the absolute inactivity on your part thus far has caused our client much concern. Further thereto, we are given to understand that you have not done nor are you doing our client the courtesy to keep him informed or enlightened as regard your further action, if any, in respect of the said land.

In view of the foregoing, we have instruction from our client to hereby accept the repudiation on your part and to treat himself as discharged from further liabilities under the said Agreement.

In view of the foregoing, we have instruction from our client to hereby accept the repudiation on your part and to treat himself as discharged from further liabilities under the said Agreement.

In the premises, please be advised that you are to return to this office with immediate effect the title to the said land which was surrendered to you by our client for the purpose of subdivision, pursuant to Clause 10 (3) of the said Agreement.

We await your due submission.

Thank you.

[14] Consequently, by a 'Deed of Revocation of Power of Attorney' dated 18 December 1992 ('the deed of revocation of power of attorney') and registered as P/A No 71/92 Ref. DOPG 11/01/11/Vol.V/31 in the district land office, Penampang the deceased duly revoked the power of attorney. The deed of revocation of power of attorney read as follows:

DEED OF REVOCATION

OF POWER OF ATTORNEY

THIS DEED is made the 18th day of December 1992 by me BALANTAI BIN SINANGAU (NRIC NO H 0046463) of Kg Nosoob in the District of Penampang in the State of Sabah Malaysia.

WHEREAS by a Deed dated the 21st day of February 1984 and registered in the Magistrate's Court Penampang in the State bearing registration No 11/1984 I appointed NAMAN BIN DALU @ JAMESOON (NRIC NO. H O117334) of Kg. Kiampalang Inanam Kota Kinabalu in the said State my Attorney for me and in my name to do certain acts and things connected with my landed property known and identified as NT 44378 situate in the district of Penampang in the said State.

NOW THIS DEED WITNESSETH that I HEREBY REVOKE the said Deed and Power of Attorney and every power and authority thereby conferred PROVIDED THAT nothing herein contained shall affect the validity of any act or thing done by the said NAMAN BIN DALU @ JAMESOON by virtue of the powers conferred on him by the said Deed before he has received notice of the revocation thereof.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first abovewritten

[15] By letter dated 16 February 1993, the ACLR, Penampang wrote to the deceased's solicitors to inform that according to the department's records, the said power of attorney made by the deceased and dated 21 February 1984 has been revoked vide 'PA No 71/92' dated 18 December 1992. That letter reads:

JABATAN TANAH DAN UKUR

(LANDS AND SURVEYS DEPARTMENT)

PEJABAT PENOLONG PEMUNGUT HASIL TANAH

DAERAH: PENAMPANG

TELEFON: 711963

BIL. TUAN: TARIKH: 16hb Feb 1993

BIL. KAMI: DOPG. LE No 146/92

M/s Richard Malanjum Idang & Rantau,

P.O Box No 12225,

88825 Kota Kinabalu

Re: Notice Appearing In The Daily Express

On The 8th January 1993 Regarding NT

4437 Belonging To Balantai Sinangau

Terima kasih keatas surat tuan Bil RMIR/YKS/93/35 bertarikh 19 Januari 1993 mengenai keterangan yang bertajuk diatas.

Sila dimaklumkan bahawa mengikut rekod di pejabat ini 'Power of Attorney' yang dibuat oleh Encik Balantai bin Sinangau pada 21 Februari 1984 telah pun dibatalkan melalui PA No 71/92 pada 18 Disember 1992 yang mana fotokopi nya disertakan bersama untuk rujukan tuan.

Saya yang menurut perintah,

(Sign.)

(NORBERT LEE)

Penolong Pemungut Hasil Tanah,

Penampang.

[16] However on 8 November 1993, that is, about nine months later, Naman purportedly as attorney of the deceased executed a Memorandum of Transfer in respect of the said land in favour of YKS as transferee in consideration of the sum of RM50,000. The ACLR, Penampang accepted the said transfer for registration under Memorial No 55919 dated 8 November 1993. The Memorandum of Transfer, pursuant to s 104 of the Ordinance, inter alia, reads:

I... BALANTAI BIN SINANGAU... being registered as the... owner... of the land described in the title as numbered above, and registered in the DISTRICT Land Registry at PENAMPANG subject to the sub-leases, charges or other interests registered against the said title in the Register of Titles:

In consideration of the sum of ringgit FIFTY THOUSAND ONLY... paid to me... by... YEO KEE SENG... (hereinafter called the transferee/s), the receipt of which sum I/we hereby acknowledge, do hereby transfer all my/our rights, title and interest in the said land to the transferee/s to the extent of the share/s shown in the column/s headed 'undivided share' against my/our name/s and the name of the name/s of the transferee/s respectively.

In witness whereof, I/we have hereto set my/our hand this 8 NOV 1993.

Signed by NAMAN BIN DALU @ JAMESOON (H 0117334) the registered Attorney vide P/A No. 1/84 for the transferer.

[17] Thus, as can be seen above, the Memorandum of Transfer was signed by Naman purportedly as the registered attorney of the deceased as transferor, the power of attorney having been revoked on 18 December 1992, and YKS as transferee, and both their signatures were attested to by one Maihol Mahap, an advocate and solicitor. The Memorandum of Transfer was accepted by the ACLR, Penampang for registration. Section 104 of the Ordinance reads:

When any land is intended to be transferred or charged or charged or sub-leased, the parties shall execute a memorandum substantially in one of the forms in Schedule XIII, XIV, XV, or XVI, with such variations as the Registrar may permit, which are necessary or desired and not inconsistent with anything in any Ordinance for the time being in force.

[18] On 21 June 1994, ie, about seven months after the purported transfer of the said land to him, YKS executed a Memorandum of Charge in respect of the said land in favour of the appellant as collateral for a loan of RM100,000. The ACLR, Penampang accepted the said charge for registration under Memorial No 56748 dated 21 June 1994.

[19] As a result of complaints made by the deceased to the land office with regards to the said land, the Assistant District Officer (Administration) called for a meeting of the parties. On 20 July 1995 the parties met at the office of the Assistant District Officer. Minutes of the meeting were taken and it read as follows:

CATITAN PERJUMPAAN KES TANAH NT 4437 DI ANTARA ENCIK BALANTAI DENGAN ENCIK YEO KEE SENG

Tarikh: 20hb July 1995

Tempat: Pejabat Penolong Pegawai Daerah (Pentadbiran)

Masa: 9.45 pagi

Masa: 9.45 pagi

1. Puan Luvita Koisun [Penolong Pegawai Daerah (Pentadbiran)]

2. Puan Rosalia Tunggolou [took down minutes]

3. Encik Balantai Sinangau [plaintiff]

4. Encik Yeo Kee Seng [D1]

5. Puan Lovinteh Balantai @ Betty [plaintiff's daughter]

PENDAHULUAN:

Puan Luvita memaklumkan bahawa tujuan perjumpaan adalah untuk menyelesaikan pertikaian mengenai dengan Tanah N.T 4437 di mana satu surat kuasa dan agreement untuk membayar tanah tersebut telah ditandatangani pada 24hb Februari 1984.

PERKARA YANG DIBINCANGKAN

PROJEK PERUMAHAN

Encik Yeo Kee Seng memohon kerjasama daripada Encik Balantai supaya caveat ditarik balik supaya pembinaan rumah dapat diteruskan. Encik Yeo Kee Seng juga berjanji akan membina 10 buah rumah tidak bertingkat (10 units storey terrace house) yang telah dijanjikan kepada Encik Balantai.

Encik Balantai tidak bersetuju dengan cadangan Encik Yeo kerana perkara ini sudah berlarutan dan ia tidak mahu ditipu lagi. Encik Yeo bersetuju untuk mengembalikan tanah N.T. 4437 dengan syarat Encik Balantai membayar balik wang duit yang berjumlah RM32,000 dan gantirugi (jumlah belum dikira).

Encik Balantai tidak bersetuju. Menurut Puan Lovinteh @ Betty bapanya hanya menerima RM15,000 daripada Encik Yeo.

WANG RM50,000 YANG TERCATAT DALAM MEMORANDUM OF TRANSFER

Puan Lovinteh @ Betty telah bertanya kepada Encik Yeo Kee Seng mengenai dengan pembayaran tersebut. Encik Yeo mengaku tidak ada membayar jumlah tersebut. Jumlah itu akan dibayar setelah projek perumahan siap dibina.

Puan Luvita menerangkan bahawa Pindah Hak Milik dibuat dihadapan Peguam.

KEPUTUSAN

Tiada keputusan dibuat disebabkan Encik Balantai tidak bersetuju dengan cadangan Encik Yeo untuk meneruskan projek pembinaan perumahan di tanah tersebut.

Disebabkan tiada keputusan muktamad dibuat maka perkara ini diserahkan kepada kedua-dua pihak untuk mengambil tindakan lanjut.

Minit dicatat oleh:	Disahkan oleh:
tt	tt
(PUAN ROSALIA TUNGGOLOU)	(LUVITA KOISUN) Penolong Pegawai Daerah (Pentadbiran)

[20] The deceased further claimed that by letter dated 9 April 1996 YKS admitted being indebted to the deceased arising out of the improper dealing or transfer of the said land and offered to pay the deceased the sum of RM750,000. That letter from YKS which had the words 'WITHOUT PREJUDICE' endorsed upon it and addressed to the deceased reads:

RE: AGREEMENT DATED 21.2.1984

The above matter and the discussion with your representative Mr Husin bin Yasin/Mr Yeo Kee Seng refer.

On strictly without prejudice basis I am agreeable on offering you RM750,000 instead of the 10 units single storey of terrace houses provided under clause 4 of the said Agreement.

Please let me have your agreement within fourteen (14) days from the date hereof.

Nothing productive arose out of the above letter and hence, this suit.

THE SUIT

[21] On 24 April 1996, ie, about nine months after the land office washed its hands in relation to the deceased's complaint, the deceased filed this action against YKS, Naman and the ACLR, Penampang claiming that he has been the subject of illegal and/or fraudulent acts of YKS, Naman and the ACLR, Penampang the particulars of which are as follows:

(a) Naman claimed himself to be the attorney of the deceased when in truth he is not;

(b) YKS and/or Naman never returned the title deed of the said land to the deceased despite repeated demands;

(c) YKS and/or Naman never informed the deceased of the transfer of the said land to YKS;

(d) YKS failed to verify that Naman is/was no longer the authorised attorney of the deceased;

(e) the transfer of the said land effected between YKS and Naman purported to show that valuable consideration in the sum of RM50,000 has been paid when in truth and in fact no such payment has been received by the deceased or at all;

(f) YKS in collusion with Naman effected the said transfer

(g) the ACLR, Penampang negligently accepted for registration the said Memorandum of Transfer and the subsequent Memorandum of Charge;

(h) the ACLR, Penampang knowingly permitted the fraudulent acts of YKS and/or Naman in respect of the said transfer and the said charge respectively.

the ACLR, Penampang knowingly permitted the fraudulent acts of YKS and/or Naman in respect of the said transfer and the said charge respectively.

[22] The deceased prayed for the following reliefs:

(i) a declaration that the Memorandum of Transfer registered under Memorial No 55919 dated 8 November 1993 and the Memorandum of Charge registered under Memorial No 56748 dated 21 June 1994 are null and void and of no legal effect;

(ii) an order that the title deed of the said land be returned to the deceased with Memorials No 55919 and No 56748 duly deleted and that the deceased be reinstated as the registered owner of the said land;

(iii) damages for the fraudulent acts to be assessed;

(iv) statutory interest on the damages assessed at the rate of 8% per annum from the date of judgment till date of realization;

(v) costs; and

(vi) any other relief as this honorable court deems just.

Defence and counterclaim of YKS (first defendant)

[23] YKS claim there were several meetings between his goodself, Naman and the deceased to develop the said land into a housing estate which resulted in the signing of the agreement between the deceased and Naman. He however denied having ever represented to the deceased that being a non-native he could not buy land held under Native Title and/or be an attorney of its owner or that he used Naman as the signatory for/and on his behalf in the agreement and that Naman was appointed as the deceased's attorney at his (ie YKS) request.

[24] YKS further claim that the appointment of Naman as attorney was intended to be for 'the convenience' of the deceased since both the deceased and Naman knew each other very well and were able to easily contact each other.

[25] YKS contend that the agreement was executed after all the terms and conditions of the same had been agreed to by the deceased, his goodself and Naman. YKS admitted that Naman was his nominee and/or his agent.

[26] YKS deny that he has breached cll 3 and 7 of the said agreement. In relation to this averment, he illustrate as follows:

(a) Naman had on the 5 November 1984 submitted the development plan through his appointed architect, Messrs Billings Leong & Tan to the Majlis;

(b) the Majlis had on 6 December 1984 approved the development plan subject to its incorporation into the final Penampang Local Plan (the approval letter from the Majlis dated 6 December 1984 which was addressed to the deceased has been reproduced earlier).

(c) the building plan was also submitted to the Majlis but was not approved and as such he (ie YKS) was unable to commence any construction on the said land.

[27] Subsequently the Majlis advised him (ie YKS) through the said architect to resubmit a fresh development plan and building plan for the deliberation and approval of the Majlis.

[28] By letter dated 20 May 1995, ie about 10½ years later after the letter from the Majlis dated 6 December 1984 and addressed to the deceased (reproduced earlier) was issued, ie after the said land had been transferred from the deceased vide Naman as attorney to YKS on 8 November 1993, the Majlis approved the proposed housing development on the said land subject to several conditions. That letter from the Majlis, dated 20 May 1995 which was addressed to the architect laid down several conditions; it, inter alia, reads:

> Arkitek Billings Leong & Tan Sdn Bhd
>
> P.O. Box 10332
>
> 88803 KOTA KINABALU
>
> Tuan,
>
> PROPOSED HOUSING DEVELOPMENT ON NT. 4437, KG. NOSOOB, PENAMPANG
>
> ---
>
> Please be informed that the above development is approved by the Town Planning Committee during its meeting held on 18 April 1995 under item T.P. 62/94 subjects (sic) to:-
>
> Please be informed that the above development is approved by the Town Planning Committee during its meeting held on 18 April 1995 under item T.P. 62/94 subjects (sic) to:-
>
> 33. This approval is valid for a period of two (2) years commencing on 20 May 1995.".

[29] It is the contention of YKS that the complaints made by the deceased to the ACLR, Penampang and the Majlis were without any merit because of cl 12 of the power of attorney and cl 11 of the agreement. Clause 12 of the power of attorney gives power to the donee, ie Naman to execute a valid Memorandum of Transfer in respect of the said land transferring the same to any person. Clause 11 of the agreement, discussed earlier, states that the deceased agree to execute a power of attorney appointing Naman as his attorney and to do all things mentioned in cl 10 of the agreement including the power to charge the said land to secure a loan for the development of the said land.

[30] YKS claim that he has no knowledge of the deed of revocation of power of attorney and contend that even if there was a revocation, which is denied, the said revocation is invalid because the power of attorney is declared to be irrevocable until the said land has been fully developed and all subdivisional lots sold.

[31] In relation to his letter dated 9 April 1996 (reproduced earlier), YKS contend that that letter contained an offer on a without prejudice basis to pay the deceased the sum of RM750,000 as a lump sum payment for the 10 units of single storey terrace houses as provided for under cl 4 of the said agreement and that letter was written at the request of one Husin bin Yassin, the deceased's son-in-law with an assurance to assist YKS provided a sum of RM50,000 is paid to him (Husin bin Yassin) as commission.

[32] In relation to the sum of RM50,0000 purportedly to have been paid by him, ie YKS, as consideration for the transfer of the said land from the deceased vide Naman as attorney to his goodself, he state that that payment was made payable to Naman and not the deceased. He also claim that to date he has paid the deceased a total sum of RM32,000.

[33] In his counterclaim, YKS contend that the deceased made several unsubstantiated allegations to the ACLR, Penampang and the Majlis which resulted in the delay of issuing the letter of approval to commence the development. The deceased's conduct has delayed the development of the said land which resulted in loss and damages to him and hence he counterclaim for the following reliefs:

(a) damages from 20 May 1995 until the first condition of the Majlis's letter dated 20 May 1995 is deleted and such damages are to be assessed;

(b) statutory interest on the damages to be assessed at the rate of 8% per annum from the date of judgment until date of full payment;

(c) costs; and

(d) any other relief as this court deems just.

REPLY BY THE DECEASED

[34] In reply, the deceased state that YKS would not have paid the sum of RM50,000 to Naman who is his own employee or agent/nominee and since Naman is merely an employee of YKS, it was only logical that any purchase price of the said land should have been paid to its legal owner, ie the deceased himself.

[35] The deceased then state that he has only been paid an accumulated sum of about RM15,000 plus and contend that YKS fraudulently altered the handwritten figures on vouchers purportedly evidencing the total sum paid to and received by him.

[36] The deceased aver that it was the duty of YKS and Naman to obtain the necessary approval from all relevant authorities pertaining to the housing estate project within the stipulated period mentioned in the agreement and since YKS and Naman failed to commence the said housing estate project within the stipulated period the deceased rightly repudiated the agreement and revoked the power of attorney

[37] In relation to his complaints to the ACLR, Penampang and the Majlis, the deceased pointed out that if there were any valid complaints against YKS and Naman with the relevant authorities, such complaints occurred after the agreement has been lawfully repudiated and/or terminated and the power of attorney has been duly revoked.

NAMAN (THE SECOND DEFENDANT)

[38] Naman did not enter appearance and neither did he file a statement of defence.

THE DEFENCE OF THE APPELLANT (FOURTH DEFENDANT)

[39] The appellant was allowed to intervene by order of court on 4 September 1997.

[40] The appellant admit that it has knowledge that the deceased was the former registered owner of the said land and that YKS is presently its registered owner through formal searches conducted at the land office in Penampang.

[41] The appellant however aver that it has no knowledge of the agreement and the power of attorney and at all material times has no knowledge of the dispute in respect of the said land as between the deceased, YKS and Naman.

[42] The appellant state that sometime in June 1994, a company named Topokan Sdn Bhd applied to the appellant for overdraft facilities in the sum of RM100,000 and in consideration of the appellant agreeing to grant such facilities, YKS executed

a Memorandum of Charge in favour of the appellant over the said land of which YKS is the registered owner to secure the repayment of the facilities granted to Topokan Sdn Bhd as borrower.

[43] The appellant further state that the Memorandum of Charge was duly registered in the land office on 21 June 1994 vide Memorial No 56748 and at all material times the appellant has no knowledge of there being in existence of any deed of revocation of power of attorney by the deceased nor has there been any complaint and objection on the part of the ACLR, Penampang to the appellant's registration of the Memorandum of Charge.

[44] It is the contention of the appellant that the matter in dispute between the deceased, YKS and Naman regarding the said land was only made known to them in March 1997 when they applied to the ACLR, Penampang to effect foreclosure action as chargee of the said land and pursuant to the Ordinance against YKS on the borrower's failure to repay the overdraft facilities whereby the sum of RM176,504.84 was outstanding as on 31 October 1996.

[45] As the appellant as chargee could not proceed with the foreclosure action on the said land due to the deceased's caveat lodged against the same, they applied to court to be added as a defendant.

[46] The appellant aver that they have done all that was necessary to protect their interest as chargee and they were not in any way in breach of the rules governing the registration of the charge pursuant to the Ordinance.

[47] The appellant claim they have no knowledge of the matters alleged by the deceased in relation to the illegal and/or fraudulent acts of YKS and/or Naman and of the said meeting between the deceased and YKS at the land office, Penampang.

[48] The appellant aver that by reason of the present suit, they have suffered continuous loss since neither Topokan Sdn Bhd nor YKS have approached them to settle the outstanding loan; further the appellant has incurred extra costs in instituting further court claims to recover the same from Topokan Sdn Bhd whereby they ought to have been allowed to proceed with their rights of foreclosure against the said land and whereby the proceeds would have been sufficient to cover their loss. By reason of the aforesaid matters, the appellant pray that the deceased's claim be dismissed.

THE ACLR, PENAMPANG

[49] On the application of the ACLR, Penampang he was struck off as a party by the court on 7 October 1999. Be that as it may, we will explain later as to why we

would be of the view that the ACLR, Penampang would be a necessary party to the suit.

THE TRIAL

[50] The trial commenced on 7 October 1999.

SP1 (NORBERT LEE @ ROBERT)

[51] In his evidence, SP1, the ACLR, Penampang stated that the Memorandum of Transfer over the said land executed by Naman as holder of the power of attorney resulting in YKS becoming its new registered owner was done in accordance with the Ordinance. Under cross-examination, he said that the registration of YKS as the owner of the said land was valid under the Ordinance.

SP2 (LUVITA KOISUN)

[52] SP2, an Assistant District Officer from the office of the Collector of Land Revenue, Penampang stated that she accepted the Memorandum of Charge forwarded by the appellant for registration as it was in order. In relation to the said meeting held in the district office premises, she confirmed that what transpired at the meeting was as per minutes of the meeting.

SP3 (ROSALIA JAMES)

[53] SP3, a clerk from the office of the Collector of Land Revenue, Penampang confirmed that she took down the minutes of the said meeting.

SP4 (CHONG CHOON KIM)

[54] SP4, a surveyor, stated he was of the view that the market value of the said land as on 11 March 1997 was RM2,540,000.

SP5 (BALANTAI SINANGAU IE THE DECEASED)

[55] With regards to the agreement, the deceased stated that it was an agreement for the sale and purchase of the said land. On the same day he signed the agreement he gave the power of attorney to Naman. He later said he was under the impression that the agreement was for housing. He testified that up to date the said land has yet to be developed for housing. He further said that the deed of revocation of power of attorney was served on Naman. He confirmed that he has never received a sum of RM50,000 from YKS as alleged.

[56] In relation to the agreement the deceased said, under cross-examination, as follows:

(a) that he does not understand the terms contained in the agreement;

(b) that he signed the agreement (the document showed that a thumb print was affixed) in YKS's office and that there was no lawyer in attendance;

(c) that he is illiterate;

(d) that he does not understand the power of attorney and believed that it was a document to hasten the construction of houses and that this was the message conveyed to him by YKS;

(e) that prior to signing the agreement and the power of attorney (where a thumb print was also affixed) he did not discuss the matter with members of his family;

(f) that at the time of the signing of the agreement he did not receive any moneys from either YKS or Naman;

(g) that he does not understand the contents of the deed of revocation of power of attorney and does not know who requested him to sign the same; he later said that his daughter, Betty (SP6) was the one who advised him to instruct his lawyer to issue the deed of revocation of power of attorney;

(h) when he was referred to the Memorandum of Transfer, he said he never received the consideration of a sum of RM50,000 as stated therein; he further said he would not know whether the said sum of RM50,000 was paid by YKS to Naman;

(i) he later said he did receive a sum of RM15,000 from YKS;

(j) when referred to a document marked as exh D15, he stated that he did receive a sum of RM3,000.00 from YKS as stated therein; exh D15 reads:

> LOAN AGREEMENT
>
> I, BALANTAI BIN SINANGAU (NRIC NO H 0046463) of Penampang do acknowledge receipt of M$3,000 from... (NRIC NO...) and hereby agree to repay the said sum on demand.
>
> In consideration of the said Loan I do hereby deposit my title document NT 44378 measuring in area 5.19 acres situate in Nossob, Penampang as a lien. In the event of my failure to repay the said Loan on demand the Lender shall be entitled to proceed with the sale of the said land.
>
> Dated this 31st day of March 1984.
>
> SIGNED by the said
>
> BALANTAI BIN SINANGAU (thumb-print affixed)
>
> at Kota Kinabalu in the presence of:-.

(k) that he has no knowledge of the Memorandum of Charge dated 21 June 1994 over the said land.

[57] The deceased, who was recalled after YKS had given evidence, testified that he did not at any time take a loan of RM32,000 from YKS and in relation to the thumb prints affixed to several 'vouchers' introduced during the trial by YKS, the deceased said he does not know whose thumb-prints it were that were affixed thereupon. He also said that as far as he could remember he only received a sum of not more than RM15,000 from YKS.

SP6 (LOVINTH @ BETTY BINTI BALANTAI)

[58] SP6, testified that she personally served a copy of the deed of revocation of power of attorney on Naman in Kg Kiampalang upon the instructions of the deceased. Naman refused to acknowledge receipt of the same. Under cross-examination, she said she was informed by the land office that the said land was charged to a bank and thus lodged a caveat, viz., Caveat No 56861 against the said land. That caveat was lodged before the said land was charged to the appellant by YKS.

SD1 (Yeo Kee Seng (YKS))

[59] YKS testified that the said land is now registered in his name. He said that the development plan of the said land has been approved by the authorities. Consequently he submitted the building plans to the Majlis but has yet to obtain their approval. As far as he was concerned, there was no breach of the agreement whatsoever and he is prepared to continue with the development of the said land.

[60] In relation to the power of attorney, he insisted that Naman was entitled to transfer the said land to anyone and the same was transferred to him in accordance with the power of attorney. He insisted that the power of attorney was irrevocable but claimed he only knew that at the trial. In relation to the sum RM32,000 purportedly paid to the deceased, he insisted that it was paid 'bit by bit' and that the deceased acknowledged receipt of the payments.

[61] YKS testified that he was not aware that the agreement was "cancelled". He confirmed that he was present at the said meeting between the parties at the office of the Assistant District Officer (Administration) on 20 July 1995 but denied having admitted during the meeting that the transfer of the said land to his goodself was 'improperly done'. With regards to the Memorandum of Transfer, he insisted that it was signed before a lawyer. He then said if the Majlis had approved all the relevant plans, he would have commenced development of the said land.

[62] Under cross-examination, YKS claimed that he only knew about the deed of revocation of power of attorney during the trial. In relation to the agreement and the proposed development of the said land, he said as follows:

(a) with reference to cll 3 and 9 of the agreement, ie that Naman, as developer, upon the development plan being approved by the authorities, shall cause the said land to be subdivided and thereafter to construct houses thereon within 36 months from the date the authorities grant approval for the conversion and subdivision of the said land, YKS admitted that in his affidavit verifying list of documents (exh P18) there was no evidence of any application for conversion and subdivision of the said land;

(b) that the development plan was approved by the relevant authority on 16 December 1984;

(c) that 'I think I have already applied for conversion and subdivision of the land';

(d) that although the agreement and the power of attorney are in the name of Naman he was in effect the 'alter ego of this transaction';

(e) that 'there was some kind of agreement' between him and Naman to develop the said land;

(f) that as from 31 March 1984 the title to the said land was in his custody;

(g) that the deceased has not repaid his loan and as such he has the right to sell the said land;

(h) that he charged the said land to the appellant on 21 June 1994.

[63] In his evidence, YKS introduced several 'vouchers', the veracity of which was challenged by counsel for the deceased, to show that the deceased took loans or advances from him in the following sums:

Date	Amount (RM)
28 June 1984	5,500
23 February 1985	6,000
18 April 1985	5,000
26 January 1986	200
25 September 1986	3,000
8 August 1989	3,300

He stated that he loaned the above sums of money in good faith and did not charge any interest.

YKS admitted that as of today no house has been constructed on the said land neither had he done any piling works or in his words, 'nothing has been done yet on the land'. He then said the said land was transferred to him 'because there were lot of problems coming from the plaintiff's youngest daughter'. He did not however enlighten the court as to what these problems were.

He further said as follows:

> I have more or less paid RM50,000 for the transfer of the land as declared in Power of Attorney. I am not sure what the exact amount was. *I did not pay RM50,000 to the plaintiff. I do not know whether the plaintiff knew about this transfer or not....* I charged the land to pay for expenses to develope (sic) the land. At that time I had the money to develope (sic) the

land. *Topokan Sdn Bhd was my company.* I was thinking of using the company to develope (sic) it. It is a fact that I have defaulted in payment for this loan.... As the result of my default in payment of the loan for closure (sic) proceeding was taken. Until today I have not settled the loan. I am waiting for the outcome of the dispute we had.... *The RM50,000 was not supposed to be a purchase price. This is not meant to be the consideration for the plaintiff to transfer the land to me. At the time of the transfer I estimated the value of the land around RM600,000. The loan of RM32,000 had nothing to do with the land. It was loan transaction.*

(Emphasis added.)

YKS confirmed that he had given the title to the said land to the appellant for registration of the charge. He insisted that the agreement and the power of attorney 'did not in any way prohibit the transfer of the land to me'. He said that when the said land was transferred to his name, it was signed by Naman on behalf of the deceased. It was his belief that Naman has the authority to do so. He claimed he had no intention to cheat at any time and that 'as far as I know the agreement P9 had never been terminated by the plaintiff' and 'I am not aware that the Power of Attorney had been revoked at the time of the transfer of the land'.

SD2 (ROBERT BIN MALANKIG)

[64] In his evidence SD2 who was the Council Engineer for the Majlis since 1991, in relation to the said land, said:

I am aware of a proposed development on the land NT 4437 Kampong Nosoob Penampang. Development plan for this project has been approved by the Penampang District Council. *The building plan was never submitted by the developer. We did write to the architect for building plans, but it was never submitted.*

The time taken for the approval of building plan is normally six months. All the plans ie development plans, building plans and structural plans in normal circumstances can be approved within one to one and a half years.

(Emphasis added.)

THE APPELLANT

[65] The manager of the appellant's Kota Kinabalu branch of the bank, Fung Chiew Wee @ Fung Tze Vui ('Fung'), gave evidence for the appellant in the form of a witness statement which read as follows:

(1) I am the Branch Manager of the fourth defendant's Branch Office at Kota Kinabalu, Sabah and I state that I am fully authorised by the same to make this Statement as their Witness for the purpose of the trial of the Suit No. K2245 of 1996 at the High Court in Kota Kinabalu.

(2) I confirm that I fully understand the purpose and legal implication of this statement made by me and that every statements (sic) made by me herein contained are true to the best of my knowledge and belief.

(3) My job in the fourth defendant's bank involves the monitoring, assessments (sic) and approvals (sic) of credit funds and Banking facilities for customers, including both individuals and corporate clients.

(4) From the records and files of the fourth defendant to which I have full access and knowledge, I am aware of the fact that the first defendant in this suit, Yeo Kee Seng is known to the fourth defendant as the chargor of the land comprised in Penampang NT 213044378 'the said land') by reason that the first defendant has executed a Memorandum of Charge dated 21 June 1994 over the said Land in favour of the fourth defendant as security for a loan facility in the sum of RM100,000 granted to the Company known as Topokan Sdn Bhd ('the borrower').

(5) I confirmed that I have been shown with the original copy of the said Memorandum of Charge dated 21 June 1994 and a copy thereof which is marked as pp 1–21 in the fourth defendant's bundle of documents.

(6) I state that the legal documents and all legal matters involved in the preparation of the said Charge was attended to by the fourth defendant's Solicitors, Messrs Jayasuriya Kah & Co.

(7) I state that at the time when the original Document of Title to the said land together with the Memorandum of Charge were presented for registration at the third defendant's department on the 21 June 1994, neither the fourth defendant nor their solicitors were aware of any other interests (sic) of third party or dispute in the said land of which may affect the creation and registration of the fourth defendant's interest in the said land as chargee. Neither was there notification of any cancellation or deletion of the Memo No 55919 and Memo Seq No 08 stated in the said Document of Title which registered the Memorandum of Transfer from the plaintiff to the first defendant.

(8) Upon being informed by their Solicitors that the Memorandum of Charge having been successfully registered at the Registrar of Titles at the District of Penampang on the 21 June 1994, I state that the Loan facilities was fully disbursed to the account of the borrower for their use.

(9) I state that upon the completion of the registration of the fourth defendant's interest as chargee over the said land whereby the said charge was registered with the Memorial No 56748 and Memo Seq No 09 in the said Document of Title, the original copy of the Document of Title was duly returned to the fourth defendant for custody.

(10) I confirm that I have been shown with the original copy of the Document of Title kept in the custody of the fourth defendant and I state that the same does not indicate nor show any other interests registered therein which may affect the fourth defendant's interest as chargee.

(11). From the records of the fourth defendant for the period from June 1994 to March 1997, I am unaware of there being any disputes (sic) nor complaints from any parties made in respect of the creation of the charge over the said land by the first defendant in favour of the fourth defendant.

(12) I state that I was only made aware of the dispute between the Plaintiff in this suit with the first defendant pertaining to the transfer of the said land from the former to the latter upon being informed by the fourth defendant's Solicitors, Messrs Michael KM Yong & Co in April 1997.

(13) I further state further state that the fourth defendant had instructed their Solicitors to proceed with foreclosure proceedings pursuant to their rights as chargee as contained in the Memorandum of Charge dated 21 June 1994 against the first defendant as charger of the said land in October 1996 upon the default of the borrower in repayment of the loan granted to them together with interest accrued therein

(14) I confirm that the notice by chargee in case of default (Schedule H) dated 19 November 1996 which is shown to me and marked as p 23 in the fourth defendant's bundle of documents was issued by the fourth defendant. The said notice was issued upon the default by borrower to settle the outstanding sum of RM176,504.84 as at 31 October 1996.

(15) I state that the fourth defendant was only informed of the dispute concerning the said land between the plaintiff and the first defendant herein when their application for auction sale of the said land in February 1997 was rejected by the third defendant for reason that the said land was subject to the present suit. I confirm that I have been shown with the third defendant's letter dated March 1997 which is marked as p 24 in the fourth defendant's bundle of documents

(16) Only upon land searches conducted at the third defendant's office in April 1997 I came to know that there were various past and present caveats registered against the title to the said land by the plaintiff and his lawful representative. I was shown a search xerox copy of the Title which is marked as 25 to 28 in the fourth defendant's bundle of documents.

(17) As such, the fourth defendant has applied to intervene in the present proceedings whereby by an order of the court dated 4 September 1997 they were ordered to be included as a defendant to the suit.

(18) I state that up to present date, the fourth defendant is unable to proceed with their rights as chargee to foreclose the said Land for the purpose of reducing the sum owed by the borrower, which presently stands outstanding in the sum of RM261,086.03 as at 30 September 1999 and as such the fourth defendant has continued to suffer loss.

(19) I state that all the contents herein are the true to the best of my knowledge and belief.

(Dated 1 October 1999)

(Emphasis added.)

JUDGMENT OF THE HIGH COURT

[66] On 29 June 2000, the learned judge allowed reliefs prayed for by the respondent and gave judgment in favour of the respondent. He made the following orders:

(i) that a declaration be issued to the effect that the Memorandum of Transfer and the Memorandum of Charge are null and void and of no effect;

(ii) that the title to the said land be returned the deceased with both Memorials duly deleted;

(iii) that the deceased be reinstated as registered owner of the said land; and

(iv) that YKS, Naman and the appellant pay costs of this action to the deceased.

[67] Only the appellant, ie the fourth defendant appealed against the decision of the learned judge.

[68] In his grounds of judgment, after laying down the facts, the learned judge noted that Naman did not enter appearance neither did he file his defence. Under the circumstances, he entered judgment against Naman. He said:

> Failing to positively respond to the plaintiff's averments as pleaded in the statement of claim, the second defendant must be deemed to have admitted the plaintiff's claim. In the circumstances, judgment is hereby entered against the second defendant as prayed.

[69] He was of the view that the following are issues that exist between the deceased and YKS, namely:

(a) whether Naman in transferring the said land to YKS has acted on the authority conferred upon him by virtue of the power of attorney;

(b) if the answer to the above question is in the negative, what then is the position of the third party charge over the said land created in favour of the appellant.

[70] On the first issue, the learned judge said that one must look and examine the objective of the agreement and the purpose of the power of attorney. He was of the view that the objective of the agreement can be clearly ascertained from para (2) of the preamble to the agreement which reads 'the owner is desirous of allowing the developer to develop the said land into a housing estate on the terms and conditions herein'.

[71] In relation to the power of attorney he said:

> In line with the objective of the agreement, the Power of Attorney was executed embodying certain terms and conditions stipulated in the said agreement. The Power of Attorney spells out in particular the powers and duties of the Attorney in dealing in the land with its development as a housing estate as its goal.

[72] It was the contention of YKS that the revocation of the power of attorney by the deceased is invalid and ineffective as the instrument has been declared to be irrevocable. In relation to this, the learned judge said:

> In this regard it must be borne in mind that in the contact (sic) of the transaction between the plaintiff and the second defendant, the Agreement is the principal instrument in which all the terms and conditions are embodied reflecting the intention of the parties. The Power

or Attorney on the other hand is a subsidiary instrument created solely for the purpose of facilitating the execution and implementation of the Agreement. In the circumstances any provision in the Power of Attorney which is not in line with the spirit of the Agreement must necessarily be considered as ultra vires the Agreement. *From the evidence adduced during the trial and reading the said Agreement as a whole it is extremely clear that it has never been the intention of the parties to have the land transferred to any person other than purchasers of subdivided lots with houses erected on them.*

(Emphasis added.)

[73] The learned judge then went on to say as follows:

It must be emphasised that the life of the Power of Attorney depends entirely on the existence and duration of the Agreement. In so far as the Agreement goes, it is the plaintiff case that there has been a breach by the second defendant by reason of the latter's inactivity of seven years after the development plan for the said land was approved. The plaintiff considered this inactivity as a breach of the Agreement by the second defendant. Consequently a letter dated 14 November 1992 was sent to the second defendant by the plaintiff's solicitors purporting to accept the second defendant's repudiation of the contract by reason of the letters (sic) inactivity. Following this an instrument of revocation of the Power of Attorney dated 18th November was served on the second defendant.

Now, the issue that arose from the foregoings is whether there was any breach of the Agreement on the part of the second defendant by reason of his inactivity that entitled the plaintiff to revoke the Power of Attorney. In this regard clearly there was no provision in the agreement that stipulates time as the essence of the contract. It is submitted by the plaintiff's counsel that the long inactivity by the second defendant is an inference that the second defendant had no intention whatsoever to carry out the proposed housing project as envisaged by the Agreement. lt is also contended that the taking of possession of the title of the said land as security for the RM3,000 loan was a tactic and ploy by the first defendant to have the said land transferred into his own name.

Section 40 of the Contracts Act 1950 provides that when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the (innocent) party may put an end to the contract. Applying this provision to our present case can it be said that the second defendant has refused to perform his obligations under the contract? Put it in another way, has he failed to carry out his side of the bargain. As stated earlier there is no time clause in the Agreement. In the case of *Jamshed Khodaram Irani v Burjorji Dhunjibai* 1915 AIR PC 83 it was held that equity will look at the substance rather the letter of the agreement to ascertain whether time is of the essence. In the case of *Freeth v Burr* (1874) LR 9CP 208 and *Mersey Steel and Iron Co v Naylor, Benzon and Co* (1882) 9 QBD 649 it was held that an intention not to go on with the contract can be inferred from conduct. The intention not to perform the promise in such cases has to be gathered from the surrounding facts of the case.

In the instant case even though no dateline was set for the second defendant to complete the housing project on the said land this does not mean that he was entitled to sit on the contract as long as he liked. Understandably the plaintiff experienced great anxiety as the result of the seven years silence and inactivity by the second defendant. This inordinate delay has certainly and reasonably given a strong reason for the plaintiff to draw an inference that the second defendant had abandoned the contract and thereby gave the plaintiff the option of either to accept the repudiation or otherwise. By his counsel's letter dated 14th November 1992, the plaintiff communicated to the second defendant of his acceptance of the second defendant's repudiation of the Agreement. By this acceptance, the contract can be considered as formally terminated. As a result of this the life of the Power of Attorney too

must necessarily come to an end. To reinforce his intention to revoke the Power of Attorney the plaintiff on 18th December 1992 executed a Deed of Revocation of Power of Attorney and had it served on the second defendant. Notwithstanding the revocation, the second defendant on 8th November 1993 executed a Memorandum of Transfer transferring ownership of the said land to the first defendant. In the said Memorandum of Transfer it was declared that a sum of RM50,000 was paid to the plaintiff as consideration for the transfer. The plaintiff denied receiving this money. As of fact the money was never paid. This was confirmed by the first defendant's own evidence which states that first defendant had intended to make such payment only upon completion of the project.

Indeed this court is in agreement with submission of the plaintiff's counsel. The first defendant had no business to have the property transferred to himself for the following reasons.

Firstly, the Agreement did not make any provision for the transfer of the land other than in subdivisional form with house erected on each of the subdivided lot.

Secondly, at the time of the execution of Memorandum of Transfer in favour of the first defendant, the second defendant was no longer clothed with authority to deal in the land as the Power of Attorney had been effectively revoked.

Secondly, at the time of the execution of Memorandum of Transfer in favour of the first defendant, the second defendant was no longer clothed with authority to deal in the land as the Power of Attorney had been effectively revoked.

Fourthly, the inordinate delay and the long inactivity of the second defendant coupled with fact that no progress had been made in the development of the land evinced that the second defendant had no intention to embark on the project. This conclusion of mine is magnified by the fact that the land was transferred to the first defendant who is as (sic) not a party of the Agreement. The conduct of the first and second defendant, going by the civil standard of proof, can be considered as an act of deception.

In view of foregoings, it is my considered view that the transfer of ownership of the land in question to the first plaintiff was unconscionable and should therefore be annulled and set aside.

[74] On the second issue, the learned judge said as follows:

It is submitted that as The Sabah Land Ordinance (Sabah Cap 68) makes no provision conferring indefeasibility of title to or interest in land upon registration reliance may be placed on authorities based on section 340 of the National Land Code 1965 which is a codification of the common law position.

Counsel cited two authorities, namely *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 and *Datuk Jagindar Singh v Tara Rajaratnam* [1983] 2 MLJ 196. It is submitted that if the first defendant title is liable to be set by the plaintiff, it follows that any interest granted by the first defendant to a third party is also liable to be set aside unless the first defendant is a purchase (sic) in good faith and for value.

Looking at the circumstances under which the first defendant acquired his ownership in the said land it can hardly be said that he is a purchaser in good faith and for value. In this regard I am adopting the stand taken by Idris J in the case of*Dato' Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1996] 4 MLJ 295 wherein it was decided that indefeasibility could only be successfully attacked by evidence which manifested that registration was obtained by means of an insufficient or void instrument. As has been repeatedly said, the transfer of ownership in the land to the first defendant is heavily tainted with unpropriety

that led to illegality. The transfer being illegal, naturally the first defendant would not be in the position to pass down any kind of interest in the land to anyone. It follows that the charge which he had created in favour of the fourth defendant must also be invalidated. For the reasons stated, I allow the plaintiffs claim in terms of prayer (a) (b) and (e) of the statement of claim.

[75] As no evidence was adduced by YKS to support his counterclaim the learned judge dismissed it with costs. YKS did not appeal.

[76] As mentioned earlier, only the respondent, ie the fourth defendant appealed. The grounds of appeal are as follows:

(a) that the learned judge failed to consider the fact that the Memorandum of Charge registered under Memorial No 56748 is a separate and distinctive dealing with the said land from the Memorandum of Transfer in favour of YKS registered under Memorial No 55919;

(b) that the learned judge failed to take into consideration that the appellant was and is at all material times a bona fide third party for value without knowledge of any defect in YKS's title to the said land;

(c) that the learned judge misconstrued and failed to give effect to s 88 of the Ordinance;

(d) that the learned judge erred in law for failing to appreciate that the State of Sabah adopts a Torrens System or a modified Torrens System which confers indefeasible title to a bona fide third party for value without notice upon registration of a land dealing; and

(e) that the learned judge erred in law in ruling that the said charge created in favour of the appellant be declared void.

[77] Before this court, the appellant's counsel pointed out the following:

(a) that YKS charged the said land to the appellant as security for a banking facility of RM100,000 granted to Topokan Sdn Bhd and the charge was registered under Memorial No 56748 dated 21 June 1994;

(b) that when the original document of title to the said land together with the said charge were presented for registration on 21 June 1994, neither the appellant nor their solicitors/agents were aware of any third party interest or dispute in the said land which may affect the creation of their interest in the said land as chargee neither was there notification of any cancellation or deletion of Memorial No 55919 by which the said transfer was registered in favour of YKS;

(c) that the said facility was disbursed upon the registration of the charge and the original document of title of the said land was later returned to the appellant for their safe custody;

(d) that the appellant only became aware of the dispute in respect of the said transfer when their application for auction sale of the said land in February 1997 was rejected by the ACLR, Penampang.

[78] The appellant's counsel then said the appeal is against that part of the order which affects and extinguishes their rights as the registered chargee. **A**

JUDGMENT OF THIS COURT

[79] We find nothing erroneous with the decision of the learned judge in granting the declaration and making the orders that he did. As mentioned earlier, YKS and Naman did not appeal against the decision. That being the case, we feel we should not delve too deeply into the issues between the respondent, YKS and Naman, unless necessary, with regards to this appeal by the appellant. **B**

C

[80] The learned judge ruled that the transfer of ownership in the said land to YKS 'is heavily tainted with impropriety that led to illegality' and 'the transfer being illegal, naturally the first defendant would not be in a position to pass down any kind of interest in the land to anyone'. He concluded that 'it follows that the charge which he had created in favour of the fourth defendant must also be invalidated'. **D**

[81] In canvassing the appeal, the appellant's counsel argued that the learned judge failed to take into consideration that the appellant was and is at all material times a bona fide third party for value without notice of any defect in YKS's title over the said land. In relation to this he referred to *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 where Edgar Joseph Jr FCJ said (at p 530): **E**

> When, as here, the question arises whether a person dealing with a company has contracted in good faith, there is no qualification on the definition of purchaser, all that is necessary is that he should have contracted in good faith and have given value. In our view, for this purpose, the common law definition of who is bona fide purchaser is applicable and, for this, we would refer to *Hunt v Fripp* [1898] 1 Ch 675 cited to us during the argument, where Byrne J said this (at p 682): **F**
>
> > I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly, that saying 'dealing bona fide' is equivalent to saying 'dealing honestly', and that what I really have to consider is, were the plaintiffs behaving honestly when they took the assignment in question from Emery?' **G**

H

[82] The appellant's counsel also referred to *Ong Ban Chai & Ors v Seah Siong Mong* [1998] 3 MLJ 346 at pp 372–373 where Mokhtar Sidin JCA, in following the decision of the Federal Court in *Pekan Nenas*, said:

> The Federal Court decided that to be a bona fide purchaser for value one should have contracted in good faith for value, and that knowledge of an adverse claim is not fraud. The material time is the time of the transaction. We observe that the Federal Court found in favour of the intervener/purchaser ie the appellant company, which paid the balance of the purchase price when the second caveat was still subsisting. Delivering the judgment of the Federal Court, Edgar Joseph Jr FCJ said at p 508: **I**

A The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction (see *Kanssen v Rialto (West End) Ltd* [1944] Ch 346; *Morris v Kanssen* [1946] AC 459).

[83] The appellant's counsel then argued that the appellant had contracted in good B faith for value without notice of the alleged defect in YKS's title at the time the charge was registered and the facility disbursed. He further pointed out that the appellant was not a party to the fraud. He submitted that s 88 of the Ordinance does imply the basic Torrens system concept that title to or interest in land vests and divests only upon registration and as such argued that as the appellant's registered charge is not C only indefeasible under the Torrens system, it also cannot be defeated for it was acquired by the appellant as a bona fide purchaser for value without notice. Section 88 of the Ordinance reads:

No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been D registered in accordance with the provisions of this Part.

[84] The appellant's counsel further submitted that the indefeasibility concept is a feature of the Torrens system of land registration whereas the bona fide purchaser principle is a creature of equity and that the indefeasibility concept in Sabah's E modified Torrens system is found in s 88 of the Ordinance. He argued that rejection of the bona fide purchaser principle would undermine the registration of title/interest under the Ordinance for there will not be certainty in land registration and business will also be undermined as an individual or financial institution will not secure the title/interest registered in their favour even though they have no notice of defects in F the title.

[85] For the reasons aforesaid, he prayed that the learned judge's decision be reversed in so far as it concerns the said charge, the custody of the original document of title and the order on costs in relation to the appellant and that the ACLR, Penampang be ordered to proceed with the application by the appellant for sale of the G said land.

[86] The appellant's counsel argued that the appellant was and is at all material times a bona fide third party for value without notice of any defect in YKS's title over the said land. We do not think so and the following are our reasons.

H

[87] Section 4 of the Ordinance provides 'title' means 'any Lease, Provisional Lease, or entry in the Native Title Register, or in the Field Register issued under the provisions of this Ordinance'. Section 4 of the Ordinance also provides 'Native Title' means 'an entry in the Native Title Register or in the Field Register under Part IV'. I Sections 91 and 93 of the Ordinance reads:

Separate Register to be kept

Separate Registers shall be kept for Leases, Provisional Leases, *Native Titles*, Field Registers and Temporary Occupation Licences and the Registrar shall record therein all titles and dealings required or entered in the Register.

Register of Memorials

The Registrar shall keep a book to be called the Register of Memorials in which shall be entered a short description of every memorandum registered. Such book shall be in the form of Schedule XII.

(Emphasis added.)

[88] Section 67 of the Ordinance, which appears under Part IV of the Ordinance, which relates to Native Lands, provides that a Register of Native Titles shall be kept in each district in the form of Schedule X (s 67(1)) and 'a certified copy of the entry in the Native Title Register may be issued to the owner and shall be signed by the Collector and shall have marked thereon a plan of the land to which it refers' (s 67(3)).

[89] In the instant appeal the said land is held under Native Title. The title to the said land is couched as follows:

STATE OF SABAH

District PENAMPANG

Serial No. 44378

REGISTER OF NATIVE TITLE

UNDER SECTION 67 OF THE LAND ORDINANCE

(Cap.68)

Name of Kampong Title	Annual Rent	Survey No	No of Former Title
Nosob	$2.60	34	
	Area	Plan No	
	A R P	1394	
	5 0 19		

Name of Owner
1 Balantai bin Sinangau
2 Yeo Kee Seng

Express Conditions

Padi

Registered the 9th day of October 1968.

L/S. 105/1/5/II/174

(Sign.)

ACLR

[90] The title to the said land showed the following endorsement:

Permission is granted on this first day of December 1979 to operate a kampung...(illegible)... on this land.

It also showed that the said land was transferred to YKS on 8 November 1993.

[91] Part IV of the Ordinance which relates to Native Lands comprise of sections 64 to 85. We will refer only to ss 64, 67 and 70. The relevant provisions read, inter alia, as follows:

PART IV

NATIVE LANDS

64. (1) This Part shall apply only to lands held by a natives, and *no non-native may purchase any land held under this Part*, unless in accordance with the terms of *section 17*, or acquire any interest therein by way of charge or otherwise.

(2) Notwithstanding the provisions of any written law, any power of attorney whereof the donee or any donee is a non-native, if it relates to any land held under this Part, shall be null and void.

(3)....

67. (1) A Register of Native Titles shall be kept in each district in the form of Schedule X.

(2)....

(3) A certified copy of the entry in the Native Title Register may be issued to the owner and shall be signed by the Collector and shall have marked thereon a plan of the land to which it refers.

70. (1) Applications for State land under this Part shall be made to the Collector, and shall be dealt with without delay and as far as possible in the order in which they are received.

(2) *Land which is to be or has been alienated under this Part or under similar part of any previous Land Ordinance shall not be used for other than agricultural purposes except with the permission of the Minister* who may impose additional premium or rent or add or substitute such terms and conditions as he may think fit.

(3)....

(4)....

(Emphasis added.)

[92] What is clear, pursuant to s 64 of the Ordinance, is that no non-native may purchase any land held under a Native Title, unless in accordance with the terms of s 17 of the Ordinance, or acquire any interest therein by way of charge or otherwise. In the instant appeal the evidence showed that the Native Title to the said land was issued to the deceased as owner and was signed by the Collector in accordance with s 67(3) of the Ordinance. Section 4 of the Ordinance provides 'Collector' means 'any Collector of Land Revenue or Assistant Collector duly appointed under this Ordinance'.

[93] Section 17 of the Ordinance, intituled 'Land dealings with natives' reads:

(1) Except with the written permission of the Minister *all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and*

no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

(2) *Any non-native desirous of purchasing land from a native shall address his application to the Secretary of Natural Resources* who, if he sees fit to sanction such purchase, shall, if the native owner consent, require such native owner to execute a memorandum of surrender of the title and shall fix the premium and rent at which the land shall be leased by the Government to the applicant and such new lease shall be issued under Part II or III.

(3) Nothing in subsection (1) or (2) shall be held to prevent dealings in land between any non-native and a native who is a holder of a lease issued under Part II or Part III in respect of such land.

(4) Notwithstanding the provisions of this section and of section 64 *it shall be lawful for the owner of land held under the provisions of Part IV to execute a memorandum of charge over such land* in favour of the Sabah Credit Corporation incorporated under the provisions of the Credit Corporation Enactment 1981 or any bank or finance company licensed under the provisions of the Banking and Financial Institutions Act 1989, any Islamic bank licensed under the provisions of the Islamic Banking Act 1983 or any other company or body corporate approved by the Yang di-Pertua Negeri, and in such case the Corporation, bank or other authorised person, for the purposes of the registration of any such charge or the exercise of any legal powers vested in it by the terms of such charge or under the provisions of this Ordinance in respect of such charge shall have and may exercise all the rights and powers as if such land were charged to a native and may transfer its interest under such charge or, if thereto entitled, cause the land to be transferred to any such persons as, having regard to the conditions of title, may obtain registration of such transaction.

(5) Notwithstanding the provisions of this section and of section 64, it shall be lawful for the owner of land held under the provisions of Part IV to grant a sublease of such land to a non-native for a term not exceeding ninety* years.

(Emphasis added.)

[Amended to thirty years by Enactment 5/00 which came into force on 30 December 2000]

[94] What is clear from s 17 of the Ordinance are the following:

(a) except with the written permission of the Minister, all dealings in land between a non-native on the one hand and the native on the other hand is expressly forbidden and no such dealing shall be valid or shall be recognised in any court of law unless that dealing was entered into and concluded before 16 January 1883;

(b) any non-native who wants to purchase land from a native shall address his application to the Secretary of Natural Resources who may then impose certain terms;

(c) dealings between any non-native and a native who is a holder of a lease issued under Part II or Part III of the Ordinance which deals with country land and town land respectively held under lease are allowed;

(d) it shall be lawful for the owner of land held under a Native Title to execute a memorandum of charge over such land in favour of the Sabah Credit Corporation, any licensed bank or finance company, any Islamic bank licensed under the provisions of the Islamic Banking Act 1983 or any other company

A or body corporate approved by the Yang di-Pertua Negeri; such chargee may exercise all the rights and powers as if such land were charged to a native and may transfer its interest under such charge or, if thereto entitled, cause the land to be transferred to any such persons as, having regard to the conditions of title, may obtain registration of such transaction;

B (e) it shall be lawful for the owner of land held under a Native Title to grant a sublease of such land to a non-native for a term not exceeding ninety* years (amended to thirty years by Enactment 5/00 which came into force on 30 December 2000).

C **[95]** Thus, pursuant to the Ordinance, only a 'Native' can own land held under a Native Title and only he can charge such land to the persons or institutions mentioned in s 17(4) of the Ordinance.

[96] Can YKS at the material time be registered as owner of land held under Native Title? We do not think so. YKS has not furnished any evidence to show that he is a D 'Native' and hence does not qualify to own land held under Native Title. The Ordinance does not define what is a 'Native'. For that answer, we have to refer to the Interpretation (Definition of Native) Ordinance (Cap.64) ('the Interpretation Ordinance'). This Interpretation Ordinance came into force on 10 December 1952. The preamble reads as follows:

E

> To define the expression 'native' in a more precise manner and to make certain consequential provisions thereon.

[97] Section 2 of the Interpretation Ordinance reads:

F

(1) *Wherever the word 'native', used as a substantive, occurs in any written law in force at the commencement of this Ordinance*, other than the Ordinances set out in the Schedule to this Ordinance, or in any written law coming into force after the commencement of this Ordinance, unless expressly otherwise enacted therein, it shall mean either —

G (a) any person both of whose parents are or were members of a people indigenous to the Colony; or

(b) any person ordinarily resident in the Colony and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or

H (c) any person who is any person who is ordinarily resident in the Colony, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people indigenous to the Colony of Sarawak or the State of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance:

I Provided that if one of such person's parents is or was a member of any such people and either lives or if deceased is buried or reputed to be buried in the Colony, then the qualifying period shall be reduced to two years;

(d) any person who is ordinarily resident in the Colony, is a member of a people indigenous to Indonesia or the Sulu group of islands in the Philippine Archipelago

or the Federation of Malaya or the Colony of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance.

(2) ....

(3) *No claim by any person to be a native by virtue of the provisions of paragraph (b), (c) or (d) hereof shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under section 3.*

(Emphasis added.)

[98] Section 3 of the Interpretation Ordinance reads:

(1) Any person claiming to be a native may apply to a Native Court established under the Native Courts Ordinance, and having jurisdiction in the area in which such person reside to declare -

(a) that such person is recognised by native law and custom as the parent or child, as the case may be, of any other person; or

(b) that such person is a member of a native community, has so lived during any stated period, and while so living has borne a good character; or

(c) that such person is a member of a people named in paragraphs (c) or (d) of subsection (1) of section 2; or

(d) that a parent of such person is or was a member of a people named in paragraph (c) of subsection (1) of section 2 and living, or if deceased is buried or reputed to be buried, in the Colony.

(2) Any Native Court referred to in subsection (1) to whom an application is properly made under such subsection shall have exclusive jurisdiction to entertain and determine any such application and to make such declaration as the case requires.

(3) Any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by subsection (2) shall be subject to scrutiny and appeal as if it were a proceeding or order of such Native Court.

(4) The final decision on any application made under subsection (1) shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates.

[99] YKS has not furnished an appropriate declaration made by a Native Court under s 3 of the Interpretation Ordinance to show that he is a 'Native'. Without such a declaration, his status or position would be that of a non-native. Section 64 of the Ordinance provides no non-native may purchase Native Land held by a native. YKS is a non-native and hence cannot purchase the said land which at the material time was owned by a native, viz, the deceased.

[100] Section 17(1) of the Ordinance clearly provides all dealings in land between non-natives and natives are expressly forbidden and no such dealings shall be valid or shall be recognised in a court of law.

[101] Based upon the above premises, we cannot comprehend how SP1, ie the ACLR, Penampang can testify that the Memorandum of Transfer over the said land

executed by Naman as attorney for the deceased as transferor and YKS as transferee is valid under the Ordinance, which to us, would denote that the said transfer does not fall foul of ss 17 and s 64 of the Ordinance. We further cannot comprehend why SP1 chose to ignore the relevant provisions of the Ordinance when the said transfer was clearly a dealing over the said land which would of course attract the restrictions applicable to Native Titles.

[102] SP1 was the ACLR, Penampang and he has admitted that he was the officer who registered the Memorandum of Transfer over the said land which was on 8 November 1993. He could clearly see from the Memorandum of Transfer that Naman as attorney for the deceased under the power of attorney signed the transfer form as transferor. The evidence further showed that SP1 has knowledge that the power of attorney was revoked on 18 December 1992, ie, about 11 months prior the registration of the Memorandum of Transfer. We say so because SP1 was the signatory to the letter from the office of the Collector of Land Revenue, Penampang dated 16 February 1993 wherein SP1 wrote to the deceased's solicitors to confirm that the said power of attorney made by the deceased dated 21 February 1984 has been revoked by PA No 71/92 dated 18 December 1992.

[103] SP1 was and is at all times, as ACLR, Penampang duty bound to see that dealings in land do not fall foul of the provisions of the Ordinance. He would, as ACLR, Penampang be aware of the statutory provisions which need to be adhered to in the course of his duties and daily work. He cannot act contrary to statutory requirements which would have the effect of nullifying the provisions of the Ordinance. He also cannot ignore statutory requirements or restrictions and act as if they are non-existent. He even seemed to have ignored the fact that the deceased vide his solicitors has lodged a caveat prior to the transfer of the said land.

[104] The above are our reasons why we are of the view that the ACLR, Penampang should not have been struck out as a party. In his statement of claim, the deceased has pleaded that he has been the subject of illegal and/or fraudulent acts of the defendants, which would include the ACLR, Penampang. He also claimed for damages. The particulars proffered by the deceased in relation to this reads:

> (f) The first defendant (ie YKS) in collusion with the second defendant (ie Naman) effected the said transfer.
>
> (g) The third defendant (ie the ACLR, Penampang) negligently accepted for registration the said transfer and the subsequent said charge.
>
> (h) The third defendant (ie the ACLR, Penampang) knowingly permitted the fraudulent acts of the first and/or second defendants in respect of the said transfer and the said charge respectively.

[105] The learned judge's transcript of the minutes of the trial showed that at the outset of the hearing, viz, on the first day of the trial, counsel for the ACLR, Penampang (the third defendant) alerted the learned judge as to encl 22 which is their application under O 18 r.19 of the Rules of the High Court 1980. The deceased's counsel, for reasons better known to him, did not object. As such the learned judge allowed the application with no order as to costs.

[106] We also noticed that in the court below and before us, neither counsel enlightened the court as to the provisions relating to land held under Native Titles under the Ordinance, especially in relation to restrictions in ownership and dealings. We wonder why. We noted that Native Lands shall not be used for other than agricultural purposes (s 70(2) of the Ordinance). As such, we wonder under which provision of the law was approval given to the deceased by the Majlis to develop the said land into a housing estate. Further, from our reading, Naman's position as donee of the power of attorney would not seem to fallen foul of s 64(2) of the Ordinance but then, the learned judge has ruled that at the time of the execution of the Memorandum of Transfer in favour of YKS by Naman as attorney of the deceased, Naman was no longer clothed with authority to deal in the said land as the power of attorney has been effectively revoked. That by itself would mean that the transfer of ownership of the said land to YKS is invalid or null and void. That transfer would clearly also be invalid or null and void by virtue of the provisions of the Ordinance discussed above. Consequently, YKS was not in a position to charge the said land to the appellant.

[107] We now come to the position of the appellant as chargee. Can the appellant be considered to be acting bona fide under the circumstances discussed earlier? We do not think so. According to the appellant, vide its manager, Fung, the legal documents and all legal matters involved in the preparation of the Memorandum of Charge were attended to by their solicitors, Messrs Jayasuria Kah & Co Fung claimed that the appellant was not aware of any dispute nor complaint over the said land and that the title to the said land does not indicate nor show any other interest registered therein. He then testified that only upon land searches at the office of the ACLR, Penampang in April 1997 did the appellant discover that there were various 'past and present caveats' registered against the title to the said land.

[108] We would have thought land searches in relation to the said land at the office of the ACLR, Penampang would have been conducted by the appellant or their solicitors at the outset, ie prior to the appellant agreeing to the same being charged to them. We note that the Memorandum of Charge was dated 21 June 1994 whilst the land searches at the office of the ACLR, Penampang were only carried out by the appellant in April 1997.

[109] We find it difficult to fathom the above reasons canvassed by the appellant to support their contention that they are bona fide under the circumstances. First of all, what would be clear to the appellant at the time of their entry into the transaction is that the land to be charged is held under Native Title. The next issue which would concern them would be restrictions in relation to dealings over land held under Native Title. They had solicitors on record to advise them, as pointed out to earlier by Fung, who would be knowledgeable about such restrictions in relation to land held under Native Title. The fact that YKS is the registered owner at the time of their entry into the transaction would have alerted them. Surely that would have put them on guard that something is not quite right, viz., that YKS may not be a 'Native' and hence his position as registered owner is suspect. We are sure that seeking further legal advice from their solicitors would consequently alert them to request from YKS additional proof of ownership, eg, a copy of an appropriate declaration, if any, made

by a Native Court pursuant to s 2(3) of the Interpretation (Definition of Native) Ordinance (Cap.64). In addition, a search at the land office conducted at the material time when they entered into the transaction would have revealed further that there are various 'past and present caveats' as acknowledged by Fung. After all, a caveat does constitute notice to the world at large of its contents.

[110] The appellant is a local bank in the State of Sabah. They must have knowledge of the restrictions in dealings over land held under Native Title pursuant to the land laws of Sabah. They cannot come to court and claim that the title to the said land is a clean title and maintain that they are a bona fide party for value without notice upon registration of a land dealing and indirectly ignoring the law relating to Native Lands in Sabah. The appellant is in the business of lending money to their customers and surely they would want a safe and proper collateral which will adequately protect the moneys loaned in the eventuality of a default.

[111] The appellant had full knowledge that the title to be charged was held under Native Title and that would put them on guard or put them on inquiry that YKS may not be 'Native' and hence cannot own such land. These circumstances would put a reasonable person on inquiry. The appellant, upon perusing the provisions of the Ordinance and the Interpretation Ordinance and after conducting a thorough search with the land office would be in a position to ascertain whether there was a possibility of irregularities with regards to ownership of the said land by YKS who may not be a 'Native'. They cannot proceed with the transaction unless they have ascertained the legality of the ownership of the said land under these circumstances.

[112] Section 4 of the Ordinance provides that the word 'transfer' used in connection with land or a charge means the passing of such land or charge by act of the owner or chargee or by order of the Collector or Director or of the Court, and also the memorandum in which such passing is recorded. In the instant appeal, the purported transfer of the said land from Naman to YKS was void as at that material time, ie, 8 November 1993 the power of attorney has been cancelled on 18 December 1992 vide P.A No. 71/92. That being the case, the Memorandum of Charge executed by YKS in favour of the appellant dated 21 June 1994 is also void. Section 17(4) of the Ordinance clearly provides that only the owner of land held under a Native Title can charge the same. That owner must be a 'Native'. YKS has not furnished any evidence to show he is one. As such, we cannot see how the appellant can claim that the charge is valid as between YKS and them.

[113] The appellant cannot bring themselves within the protection of s 88 of the Ordinance the way that they had approached it. The registration of the Memorandum of Charge upon the register is a nullity. Having omitted to ascertain or to make inquiries as to whether YKS is a native or a non-native as the said land was held under a Native Title, they must bear the consequences. The Memorandum of Charge is invalid and clearly cannot constitute an encumbrance upon the title to the said land. Thus the appellant would not be in a position to foreclose on the said land.

[114] For the reasons discussed above, we unanimously dismiss this appeal with costs and order that the deposit be transmitted to the respondent to account of taxed costs.

Appeal dismissed.

Reported by Brendan Navin Siva